Supreme Court, U.S.
FILED
NOV 27 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 484

CITY NATIONAL BANK OF FAIRMONT,
A NATIONAL BANKING CORPORATION,
Petitioner

Vs.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

JOHN D. AMOS
Deveny Building
Fairmont, West Virginia

WILLIAM P. LEHMAN
Home Savings Building
Fairmont, West Virginia

Counsel for Petitioner

TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Statement of the Case	2
Questions Presented	6
Reasons Relied Upon for Allowance of Writ	7
Brief in Support of Petition for Writ of Certiorari	9
Points, Authorities and Argument	9
1. In declining to decide whether the Bank stated and proved a valid claim or cause of action for fraud, deceit or misrepresentation against Fidelity, the decision of the Court of Appeals is contrary to the principles stated in Scarborough v. Atlantic Coast Line Railroad Company (1949), 4 Cir., 178 F. 2d. 253.	9
2. In holding that the "indefinitely worded" preliminary injunction granted in the interpleader suit did not toll the running of the statute of limitations, the decision of the Court of Appeals is contrary to law.	12
3. In failing to hold that the cause of action did not accrue until January 9, 1951, when the interpleader suit was decided adversely to the Bank, the decision of the Court of Appeals is contrary to the law of West Virginia.	16
4. In failing to hold that the statute of limitations was tolled during the pendency of the notice of motion for judgment proceeding in the State Court, the decision of the Court of Appeals is contrary to statute and the law of West Virginia.	20

Page

5. In failing to hold that the reservations in the State Court order of September 10, 1951, precluded Fidelity from availing itself of the defense of the statute of limitations, the decision of the Court of Appeals is contrary to the law of West Virginia. 22

6. In failing to hold that the doctrine of equitable estoppel precluded Fidelity from claiming that the statute of limitations ran during the period the interpleader suit was pending, the decision of the Court of Appeals is contrary to law. 23

Conclusion 26

TABLE OF CASES CITED

Bodkin v. Arnold (1898), 45 W. Va. 90, 30 S.E. 154 22

Cameron v. Cameron (1931), 111 W. Va. 375, 162 S.E. 173 ..... 16, 19, 21

City National Bank of Fairmont v. Fidelity Mutual Life Insurance Company (1953), N. D. W. Va., 110 F. Supp. 510 2

City National Bank of Fairmont v. Fidelity Mutual Life Insurance Company (1953), 4 Cir., 206 F. 2d. 531 2

Curl v. Vance (1935), 116 W. Va. 419, 181 S.E. 412 17

Fidelity Mutual Life Insurance Company v. City National Bank of Fairmont (1950), 95 F. Supp. 276 ..... 2, 4

Ford v. Buffalo Eagle Colliery Company (1941), 4 Cir., 122 F. 2d. 555 10

Harris v. Neil (1916), 144 Ga. 519, 87 S.E. 661 20

Horton v. Tyree (1927), 104 W. Va. 238, 139 S.E. 737 10

Howard v. West Jersey & Southern Railroad Company (1928), 102 N. J. Eq. 517, 141 A. 755 ..... 11, 26

Page

Howat v. Kansas (1928), 258 U.S. 181, 42 S. Ct. 277, 66 L. Ed. 550 15

Lutz v. Williams (1919), 84 W. Va. 216, 99 S.E. 440 22

Macke v. Jungels (1918), 102 Neb. 123, 166 N.W. 191 24

Mathews v. Dale (1937), 118 W. Va. 303, 190 S.E. 338 17

Ritter v. Ulman (1897), C.C.A. 4 Cir., 78 F. 222 13

Scarborough v. Atlantic Coast Line Railroad Company (1949), 4 Cir., 178 F. 2d. 253 ..... 7, 9, 11, 25

Ulman v. Ritter (1896), D. W. Va., 72 F. 1000 13

United States v. United Mine Workers of America (1947), 330 U.S. 258, 67 S. Ct. 677 15

TEXTS AND TREATISES CITED

34 Am. Jur., Limitation of Actions, sec. 187, p. 151 12

34 Am. Jur., Limitation of Actions, sec. 238, p. 196 12

54 C.J.S., Limitations of Actions, sec. 187, p. 185 19

UNITED STATES CODE CITED

United States Code Annotated

Title 28, sec. 1254 (1) 2

WEST VIRGINIA STATUTES CITED

Michie's 1949 Annotated Code of West Virginia Chapter 55, Article 2, Section 18 (Serial Section 5410) 20

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. ....

CITY NATIONAL BANK OF FAIRMONT,
A NATIONAL BANKING CORPORATION,
Petitioner

Vs.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, City National Bank of Fairmont, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review a final judgment entered August 8, 1953, a petition for a rehearing having been denied by order entered September 16, 1953.

Opinions Below

The opinion of District Judge Warlick (R. 3), is reported in 110 F. Supp. 510.

The opinion of the Court of Appeals—majority opinion by Circuit Judge Dobie (R. 110) and concurred in by Chief Judge Parker and dissenting opinion by Circuit Judge Soper (R. 119)—is reported in 206 F. 2d. 531 (appears in October 19, 1953, Federal Reporter, Second Series, Advance Sheet).

For a background of the facts giving rise to the situation on which this cause of action is based, reference is here made to the opinion of District Judge Watkins in *Fidelity Mutual Life Insurance Company* v. *City National Bank of Fairmont* (1950), 95 F. Supp. 276.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

The judgment of the Court of Appeals was entered August 8, 1953 (R. 122). A petition for rehearing was filed September 4, 1953 (R. 124), which was denied September 16, 1953 (R. 139). This petition for a writ of certiorari is filed within ninety days from the denial of the petition for rehearing.

Statement of the Case

This is a civil action brought by the petitioner, City National Bank of Fairmont (hereinafter called the Bank), against the respondent, The Fidelity Mutual Life Insurance Company (hereinafter called Fidelity), to recover damages for the alleged deceit or false representation of Fidelity concerning the assignment status of a life insurance policy. The charge of deceit or false representation is based upon the failure of Fidelity's

general agent to disclose to the Bank information he had concerning the existence of an adverse claim of the insured's wife against the policy. The Bank, being led to believe by Fidelity's general agent that no previous assignment had been given, accepted an assignment of the policy as collateral security for a loan it made to the insured.

The insured went to Hupp, the Fidelity's general agent who had sold him the policy, for assistance in securing a loan. Pursuant to a telephone call by Hupp to the home office of Fidelity, its assistant counsel, Keesey, wired Hupp that there was no assignment of the policy on file there. As a matter of fact, counsel for the insured's wife had previously notified Fidelity that insured had made an assignment of the policy to his wife in connection with a separation agreement, and Keesey and Hupp were each aware of this. Hupp made an appointment at the Bank for the following day, March 4, 1949, and on that day he went with the insured to the Bank. Upon being asked by the vice president of the Bank about the existence of any assignment against the policy, Hupp replied that he had a telegram from the home office of Fidelity to the effect that the policy was clear of any assignment on record. Hupp, as general agent, through correspondence with the home office and discussions with the insured, was fully acquainted with the fact that Fidelity had been notified of the previous assignment of the policy to the insured's wife, yet he utterly failed to disclose to the Bank anything about this (R. 113).

Hupp's statement led the Bank to believe that no previous assignment of the policy had been given. Whereupon the Bank made a $5,000.00 loan to the insured on his note and accepted as collateral security an assignment of the policy on a form furnished by Hupp. The assignment was sent by Hupp to Fidelity where it was filed in due course. The insured defaulted in the payment of the note and the Bank demanded payment from Fidelity under the assignment. Fidelity refused

to pay, stating that it had notice of an adverse claim by insured's wife and was unwilling to pay either claimant until their equities were established.

On June 24, 1949, the Bank filed a notice of motion for judgment proceeding in the Circuit Court of Marion County, West Virginia, against Fidelity and the insured. Fidelity instituted an interpleader action in the District Court of the United States for the Northern District of West Virginia, on June 29, 1949. District Judge Baker entered an order that day enjoining the Bank from instituting or prosecuting any other suit or proceeding against Fidelity in any State Court or in any other Federal Court on account of the policy of insurance (R. 44). Answers were filed in the interpleader action by the Bank on July 22, 1949, by insured on August 1, 1949, by insured's wife on August 23, 1949, and an amended answer by the latter on March 9, 1950. On April 6, 1950, Fidelity, who had previously paid the $5,822.83 cash surrender value of the policy into court, was dismissed as a party to the interpleader action, thus leaving the priority of the respective claims of the Bank and insured's wife to be determined.

The interpleader action was tried on April 6, 1950, by District Judge Watkins. At this trial the Bank first learned, from the testimony of Hupp, that notice of a previous assignment of the policy by insured to his wife had been given Fidelity and that Keesey and Hupp each had knowledge of this when Keesey sent the telegram to Hupp and when Hupp advised the Bank of the substance of the telegram. On December 30, 1950, Judge Watkins filed an opinion holding that insured's wife had an equitable lien against the proceeds of the policy which had priority over the Bank's claim. *Fidelity Mutual Life Insurance Company* v. *City National Bank of Fairmont*, 95 F. Supp. 276. The order entered on January 9, 1951, awarded the money to insured's wife, less certain costs,

and further provided that the injunction theretofore awarded at the time of the institution of the interpleader action be made perpetual insofar and to the extent only that said injunction applied to prosecuting any action against Fidelity arising contractually under the insurance policy, but said injunction was not otherwise perpetuated (R. 46).

On September 10, 1951, further proceedings were had in the notice of motion proceeding in the State Court, as a result of which judgment was entered in favor of the Bank against the insured. This order further provided that Fidelity be dismissed as a party to the proceeding, but without prejudice to the right of the Bank to prosecute in any court of competent jurisdiction any action against Fidelity which does not arise contractually under the insurance policy and which does not violate the injunction awarded by the Federal Court in its orders of June 29, 1949, and January 9, 1951 (R. 47). Execution was thereafter issued and returned unsatisfied.

The Bank instituted this action against Fidelity on September 21, 1951, in the District Court of the United States for the Northern District of West Virginia. The case was tried by the court without a jury on March 24, 1952, by District Judge Warlick of the Western District of North Carolina sitting in the Northern District of West Virginia by special assignment. In a written opinion filed by Judge Warlick on February 24, 1953, he found (1) that the Bank's cause of action was barred by the statute of limitations; (2) that the evidence did not make a claim by the Bank against Fidelity for damages for fraud, deceit or misrepresentation (R. 3). In accordance with the opinion, an order was entered on February 27, 1953, in favor of Fidelity and against the Bank (R. 1).

The Bank appealed from said order to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the District Court in an order entered on August 8,

1953 (R. 122). The opinion was written by Dobie, Circuit Judge, and was concurred in by Parker, Chief Judge (R. 110). A strong dissenting opinion was written by Soper, Circuit Judge (R. 119). The majority opinion held that the Bank's cause of action against Fidelity was barred by the statute of limitations, in that two years or more had elapsed from the time of the commission of the alleged wrong, and also from the time when the wrong should have been discovered by the Bank by the exercise of due diligence. It was further held that the injunction issued in the interpleader action did not toll the running of the statute of limitations. The majority opinion stated that its holding on the issue of the statute of limitations is sufficient to dispose of the case and to justify affirmance of the judgment below, and that, accordingly, it expresses no opinion on the merits of the case—that is, on the validity of the Bank's claim of fraud, deceit or misrepresentation against Fidelity (R. 118). Judge Soper was of the opinion that the Bank had established an actionable claim of fraud, deceit or misrepresentation against Fidelity, and that its suit was brought in due time and was not barred by the statute of limitations.

The Bank filed a petition for rehearing in the Court of Appeals on September 4, 1953 (R. 124). The petition for a rehearing was denied by order entered September 16, 1953 (R. 139).

Questions Presented

1. Did the Bank state and prove a valid claim or cause of action for fraud, deceit or misrepresentation against Fidelity?

2. Is the Bank's claim or cause of action for fraud, deceit or misrepresentation against Fidelity barred by the statute of limitations?

Question 2 requires consideration of and answers to the following questions:

A. When did the cause of action in this case accrue?

B. Was the running of the statute of limitations suspended during the period the interpleader action was pending in the Federal Court?

C. Was the running of the statute of limitations suspended during the time the notice of motion for judgment proceeding was pending in the State Court?

D. Do the reservations in the State Court order of September 10, 1951, preclude Fidelity from availing itself of the defense of the statute of limitations?

E. Is Fidelity precluded under the doctrine of equitable estoppel from interposing the defense of the statute of limitations?

With respect to this petition for a writ of certiorari, the primary question is whether the Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions. The petitioner contends that the questions presented in this case are important questions of local law, and that the Court of Appeals has decided such questions in a way which is in conflict with applicable West Virginia decisions and also in conflict with its own decisions.

Reasons Relied Upon for Allowance of the Writ

1. In declining to decide whether the Bank stated and proved a valid claim or cause of action for fraud, deceit or misrepresentation against Fidelity, the decision of the Court of Appeals is contrary to the principles stated in *Scarborough* v. *Atlantic Coast Line Railroad Company* (1949), 4 Cir., 178 F. 2d. 253.

2. In holding that the "indefinitely worded" preliminary injunction granted in the interpleader suit did not toll the running

of the statute of limitations, the decision of the Court of Appeals is contrary to law.

3. In failing to hold that the cause of action did not accrue until January 9, 1951, when the interpleader suit was decided adversely to the Bank, the decision of the Court of Appeals is contrary to the law of West Virginia.

4. In failing to hold that the statute of limitations was tolled during the pendency of the notice of motion for judgment proceeding in the State Court, the decision of the Court of Appeals is contrary to statute and the law of West Virginia.

5. In failing to hold that the reservations in the State Court order of September 10, 1951, precluded Fidelity from availing itself of the defense of the statute of limitations, the decision of the Court of Appeals is contrary to the law of West Virginia.

6. In failing to hold that the doctrine of equitable estoppel precluded Fidelity from claiming that the statute of limitations ran during the period the interpleader suit was pending, the decision of the Court of Appeals is contrary to law.

Wherefore, the petitioner prays that a writ of certiorari to the United States Court of Appeals for the Fourth Circuit be granted.

Respectfully submitted,

JOHN D. AMOS
Deveny Building
Fairmont, West Virginia

WILLIAM P. LEHMAN
Home Savings Building
Fairmont, West Virginia

Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. ....

CITY NATIONAL BANK OF FAIRMONT,
A NATIONAL BANKING CORPORATION,
Petitioner

Vs.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, A CORPORATION,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINTS, AUTHORITIES AND ARGUMENT

1. In Declining to Decide Whether the Bank Stated and Proved a Valid Claim or Cause of Action for Fraud, Deceit or Misrepresentation Against Fidelity, the Decision of the Court of Appeals is Contrary to the Principles Stated in Scarborough vs Atlantic Coast Line Railroad Company (1949), 4 Cir., 178 F. 2 D. 253.

The majority opinion says that its holding that the Bank's claim is barred by the statute of limitations is sufficient to

dispose of the case and that no opinion is expressed on the validity of the Bank's claim of fraud, deceit or misrepresentation against Fidelity (R. 118).

It is submitted that on the basis of the statement of facts in the majority opinion, particularly the facts stated on R. 112-113, the Bank stated and proved a valid claim or cause of action for deceit or false representation against Fidelity.

In *Ford* v. *Buffalo Eagle Colliery Company* (1941), 4 Cir., 122 F. 2d. 555, Judge Dobie said:

> "The controlling West Virginia rule on the question of fraud is stated in the syllabus prepared by the court in *Horton* v. *Tyree, supra,* 104 W. Va. 238, 139 S.E. 737: 'Where one person induces another to enter into a contract by false representations, which he is in a situation to know, and which it is his duty to know, are untrue, he, in contemplation of law, does know the statements to be untrue, and, consequently, they are held to be fraudulent, and the person injured has a remedy for the loss sustained by an action for damages. It is not indispensable to a recovery that the defendant actually knew them to be false.' "

It is an established fact that the Bank lost $5,000.00 through the deceit and false representation of Fidelity's general agent and that the only possible defense of Fidelity is the statute of limitations. The Court of Appeals should have found that the Bank had established an actionable claim of deceit or false representation against Fidelity before passing on the question of the statute of limitations. Judge Soper had no hesitancy in expressing the view that "the money was lost through the deceit of the Insurance Company" (R. 119).

In declining to decide on the merits of the case, the majority

did not consider, apply and give the Bank the benefit of the general legal principles that statutes of limitations should be interpreted in a manner tending to discourage attempted evasions by wrongdoers, and that fraud will never be permitted to give an inequitable advantage to the one who has perpetrated the fraud, as stated in *Scarborough* v. *Atlantic Coast Line Railroad Company* (1949), 4 Cir., 178 F. 2d. 253, wherein, on page 258, Judge Dobie said:

> "Remedial statutes should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers. And unless the statute so requires with crystal clarity, it should not be so applied as to negative broad principles well settled in our law by a long series of decisions. And just such a principle was set out by Vice Chancellor Leaming, in *Howard* v. *West Jersey & Southern Railroad Co.*, 102 N. J. Eq. 517, 141 A. 755:
>
> " 'One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.' "
>
> "Vice Chancellor Leaming thus applies to statutes of limitations the ancient and beneficient doctrine of estoppel. And nothing is better settled, as a general principle, than the rule that, wherever found and in whatever guise, fraud will, in some way or manner, never be permitted to give an inequitable advantage to the one who has consciously perpetrated the fraud."

The statement by Judge Soper in his dissenting opinion, "Certainly there is no impropriety in placing a heavy burden

of proof upon a litigant who seeks to escape the consequences of his fraud by pleading the statute of limitations" (R. 121), is in accord with the principles laid down in the Scarborough case. The maxim that the law helps those who are deceived, not those deceiving, should be recognized in this case.

2. In Holding that the "Indefinitely Worded" Preliminary Injunction Granted in the Interpleader Action Did Not Toll the Running of the Statute of Limitations, the Decision of the Court of Appeals is Contrary to Law.

In the dissenting opinion, Judge Soper said (R. 120):

> "It is an established rule of law that limitations do not run against a claimant if he is prevented from bringing suit by the party to be charged, and hence, while the injunction was in effect, limitations did not run as to any suit forbidden by the court. 34 Am. Jur., Limitation of Actions, sections 187, 238."

Judge Soper was of the opinion that the statute of limitations was stayed by the preliminary injunction order for the period from the date of entry thereof until the date of entry of the permanent injunction order.

The majority opinion says that the preliminary injunction against the bringing of a suit "on account of the policy" did not forbid an action for fraud, deceit or misrepresentation in regard to an assignment of the policy; and that the Bank should have brought such a suit against Fidelity, despite the fact that the validity and priority of the respective assignments of the Bank and the insured's wife were still in issue in the interpleader action. (R. 117-118).

The view of the majority is unsound because the meaning of the preliminary injunction was not clear and was reasonably

understood by the parties enjoined and their counsel to include any suit against Fidelity pertaining to the policy. The majority concedes that the preliminary injunction was not clear in as much as Judge Dobie says, "It is true that Judge Baker's injunction was somewhat indefinitely worded." (R. 118).

The attorneys for Fidelity in this case are the same who represented Fidelity in the interpleader action. Said counsel prepared the complaint in behalf of Fidelity in the interpleader action and also the temporary injunction order entered on June 29, 1949. The principle that doubtful words will be construed most strongly against the parties using them should be applied in construing the preliminary injunction order.

It is manifestly true, as Judge Soper points out, that "a careful lawyer would not have advised the Bank that despite the injunction it was free to sue the Insurance Company on a cause of action which centered upon and related to the policy itself". (R. 120).

The advice of counsel is not a sufficient justification for violation of an injunction, but may only be considered by the court as a matter of mitigation in fixing the penalty. *Ulman* v. *Ritter* (1896), D. W. Va., 72 F. 1000; affirmed in *Ritter* v. *Ulman* (1897), C. C. A. 4 Cir., 78 F. 222. Counsel certainly should not assume the responsibility of advising a client to bring a suit in the face of an "indefinitely worded" injunction restraining the bringing of certain actions.

The final injunction order entered by Judge Watkins directed that the preliminary injunction be made perpetual "insofar and to the extent only that said injunction applies to prosecuting any action against the plaintiff (Fidelity) arising contractually under said insurance policy *** or to recover said fund *** deposited in the Registry of the Court, but said injunction is not further or otherwise perpetuated." (R. 46).

This "carefully worded" injunction, making the preliminary injunction perpetual only in part, clearly indicated that Judge Watkins recognized that the preliminary injunction was not restricted to suits arising contractually under the policy. It would seem clear that Judge Watkins did not think that the preliminary injunction issued by Judge Baker was aimed only at suits "on account of the policy" sounding in contract; otherwise, he would have simply ordered that the preliminary injunction be made perpetual, and he would not have ordered that the preliminary injunction be made perpetual only in part, in so far as same applied to any action against Fidelity arising contractually under the policy.

Again quoting Judge Soper, "Since the District Judge himself held the opinion that the preliminary injunction was not restricted to suits on the insurance contract itself but covered a wider field, how can we find fault with a litigant who took the same view?" (R. 121).

Counsel for Fidelity approved the order entered September 10, 1951, by the State Court in the notice of motion for judgment proceedings (R. 47). In said order Fidelity was dismissed as a party to said proceeding, but without prejudice to the right of the Bank to institute in any court of competent jurisdiction any action against Fidelity which does not arise contractually under the policy and which does not violate the preliminary and permanent injunction orders entered by the Federal Court in the interpleader action (R. 47). Said State Court order was entered on a date subsequent to the date when the cause of action became barred by the statute of limitations according to the majority opinion. It is inconceivable that counsel for Fidelity would have consented to the entry of said State Court order which reserved to the Bank certain rights to proceed against Fidelity, unless counsel for Fidelity recognized that the preliminary injunction order was broad enough

to cover an action for fraud, deceit or false representation. Most assuredly, if counsel for Fidelity believed at that time that any cause of action by the Bank against Fidelity for fraud, deceit or false representation was already barred by the two year statute of limitations, they would not have consented to the entry of the State Court order which reserved to the Bank the right to bring such an action against Fidelity.

The majority opinion did not consider the effect of the consent of Fidelity's counsel to the entry of said State Court order. The fact that counsel for Fidelity consented to the entry of said State Court order at that time clearly indicated that they considered the preliminary injunction had suspended or tolled the running of the statute of limitations, and that the preliminary injunction was much broader in scope than as simply restraining actions arising contractually under the policy.

The majority opinion says that although the temporary injunction order was "indefinitely worded", yet the District Judge did not intend to enjoin actions against Fidelity for tortious misrepresentations as to the policy and that he had no power to issue so broad an injunction. (R. 118). Even if the temporary injunction was broader than the prayer of the bill, or was beyond the power of the court properly to issue, yet the same continues in effect and must be obeyed until it is amended by the court issuing the same or reversed in proper proceedings. In the celebrated case of *United States* v. *United Mine Workers of America* (1947), 330 U.S. 258, 67 Sup. Ct. 677, the court said:

> "*** in *Howat* v. *Kansas*, 1928, 258 U.S. 181, 189, 190, 42 S. Ct. 277, 280, 281, 66 L. Ed. 550, this Court said:
>
> "'An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly

> invoking its action, and served upon persons made parties therein and within jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decisions are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.' "

In view of the construction placed upon the preliminary injunction by Judge Watkins and Fidelity's counsel, the Bank should not be penalized for taking the position that the "indefinitely worded" preliminary injunction covered a broad field and that it restricted any action by the Bank against Fidelity on account of the policy, including an action for fraud, deceit or false representation with respect to the assignment status of the policy.

3. In Failing to Hold that the Cause of Action Did Not Accrue Until January 9, 1951, When the Interpleader Suit was Decided Adversely to the Bank, the Decision of the Court of Appeals is Contrary to the Law of West Virginia.

Judge Dobie says that, "The applicable statutes of limitations of the State of West Virginia, and the interpretations placed on these statutes by the highest court of the State of West Virginia are not entirely clear". (R. 115).

Where there is actual fraud or deceit of a secret nature and involving concealment, it is the established law in West Virginia that the statute of limitations does not begin to run until the fraud or deceit is discovered or by the exercise of due diligence ought to have been discovered.

In *Cameron* v. *Cameron* (1931), 111 W. Va. 375, 162 S.E. 173, it is stated:

> "As the declaration charges a continuing fraud, the statute did not begin to run until the representations had ceased or their falsity was discovered. 37 C. J. 946. * * *. 'It has been stated many times that, if the basis of the action is actual fraud, mere silence is regarded as a continuation of the original fraud, and as constituting a fraudulent concealment; * * *.'"

In *Curl* v. *Vance* (1935), 116 W. Va. 419, 181 S.E. 412, the court said:

> "Laches and the statute of limitations 'cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appear that the suit was commenced within a reasonable time after the evidence of the fraud was discovered.'"

In *Mathews* v. *Dale* (1937), 118 W. Va. 303, 190 S.E. 338, the court held that where an award of workmen's compensation was secured through the fraudulent misrepresentations of a claimant, and the facts affecting the making of the award are within the exclusive knowledge of claimant and are concealed by him, such concealment was a continuation of the original fraud, and a suit instituted within the statutory period from the discovery of such fraud was not barred by the statute of limitations.

The majority opinion, without referring to these authorities, held that the deceit or false representation should have been discovered by the Bank on May 9, 1949, when Fidelity first notified the Bank of the adverse claim of insured's wife, or on August 23, 1949, when an answer was filed by the wife in the

interpleader suit. Judge Soper clearly points out the incorrectness of this holding when he said, "It would be more accurate to say that the Bank had notice at that time that it had been deceived, but it did not know that it had been defrauded until the interpleader suit went against it on January 9, 1951" (R. 121).

None of the correspondence or pleadings in the interpleader action indicates or even suggests that Hupp knew about the earlier assignment of the policy to insured's wife at the time Hupp made the representation to the Bank. The correspondence and pleadings in the interpleader action simply disclose the contractual and priority aspects of the respective assignments to the Bank and to insured's wife. The basis of a cause of action for tortious liability of Fidelity to the Bank for deceit was in no manner mentioned or indicated in such correspondence and pleadings.

It was not until the hearing in the interpleader suit on April 6, 1950, when Hupp testified, that the Bank first learned that Hupp knew of the wife's assignment claim prior to March 4, 1949, but failed to disclose this to the Bank's officials or counsel at any time thereafter during frequent conversations about the loan (R. 24, 25, 26, 27, 34, 49, 66, 74).

Prior to April 6, 1950, the Bank was not cognizant of sufficient facts to indicate to it that fraud, deceit or false representation had been perpetuated upon it by Fidelity's general agent. Even after the hearing on April 6, 1950, the Bank could not be sure of its rights until the uncertainties of the litigated questions were decided in the interpleader action.

When the entire evidence is read and considered, the conclusion of the majority that the Bank's cashier, Springer, was aware of sufficient facts to suggest that the Bank had been deceived, is not justified.

The majority requires an unreasonably high standard to

constitute due diligence on the part of the Bank, and completely overlooks a paramount duty on the part of Fidelity to disclose to the Bank the fact that Hupp as its general agent was cognizant of the prior assignment to insured's wife when he made the false representation to the Bank.

It was not until the interpleader suit was decided that the Bank knew whether its assignment was prior or subordinate to the wife's assignment. Until that time the Bank had no means of knowing whether it had been merely misled or had actually been defrauded by the representation of Fidelity's general agent that the policy was clear of any assignment on record (R. 122). If the Bank had prevailed in the interpleader action, no action based on deceit or false representation could thereafter have been successfully prosecuted by it against Fidelity.

In *Cameron* v. *Cameron* (1931), 111 W. Va. 375, 162 S.E. 173, the court said:

> "The ground of the action of deceit is fraud and damage, and when both concur the action will lie. Moreover, both must concur to constitute actionable fraud, a common statement of the rule being that neither fraud without damage, nor damage without fraud, is sufficient to support an action.' 12 R.C.L. 239. Plaintiff's injury did not precede but followed the entry of the annulment decree of dissolution of the marriage."

54 C. J. S., Limitations of Actions, sec. 187, at page 185, after discussing the general rule of the statute of limitations in case of fraud, goes on to say:

> "* * * Where, however, a cause of action for fraud does not become complete until damage results from the alleged fraudulent act, the statute of limitations does not begin to run until damage is suffered." Among the

cases cited in support thereof is *Harris* v. *Neil* (1916), 144 Ga. 519, 87 S.E. 661.

In the instant case fraud or deceit and damage did not concur until the interpleader suit was decided adversely to the Bank. Under the authority of the applicable West Virginia law, the cause of action in this case did not accrue until January 9, 1951, and therefore this action is not barred by the statute of limitations.

4. In Failing to Hold that the Statute of Limitations was Tolled During the Pendency of the Notice of Motion for Judgment Proceeding in the State Court, the Decision of the Court of Appeals is Contrary to Statute and the Law of West Virginia.

Chapter 55, Article 2, Section 18 (Serial Section 5410) of Michie's 1949 Annotated Code of West Virginia provides:

"* * * if, in an action or suit commenced within due time, judgment or decree (or other and further proceedings) for the plaintiffs should be arrested or reversed on a ground which does not preclude a new action or suit for the same cause, or if there be occasion to bring a new action or suit * * * * * by reason of any other cause which could not be plead in bar of an action or suit, * * * *; in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement, dismissal or other cause, or after such arrest or reversal of judgment or decree, * * * *, but not after."

The Court did not mention this statute in its opinion. The notice of motion for judgment proceeding by the Bank against Fidelity and the insured was timely instituted in the State Court on June 24, 1949. Said State Court proceeding was

dismissed as to Fidelity on September 10, 1951, but without prejudice to the right of the Bank to proceed against Fidelity on any claim which does not arise contractually under the policy (R. 47). Since the notice of motion for judgment proceeding by the Bank against Fidelity was "commenced within due time" and was thereafter dismissed for a cause "which could not be plead in bar of an action or suit", then, under the statute as exemplified in the case hereinafter cited, the running of the statute of limitations was tolled during the pendency of the contractual action in the State Court. The instant tortious action for deceit by the Bank against Fidelity was instituted on September 21, 1951, which was well within the time specified in said statute. Therefore, this action was timely brought and the statute of limitations is no defense thereto.

In *Cameron* v. *Cameron* (1931), 111 W. Va. 375, 162 S.E. 173, a wife brought a chancery suit against her husband to vacate, on the ground of fraud, a decree annulling a marriage in an earlier suit filed by the husband for such purpose. Because of the husband's marriage to another woman in the meantime, the court refused to cancel the decree of annulment. The wife then brought an action at law against her former husband for damages for fraud practiced upon her by the former spouse in securing an annulment of their marriage. The court said:

> "The remedy not having been terminated prior to the institution of the chancery suit to cancel the annulment decree, the pendency of that proceeding also tolled the statute. Chapter 104, section 19, Code 1923 (55-2-18, Code 1931), * * * * (next follows the text of the statute, which is here omitted) * * * *. The present action was brought within one year from the dismissal of the chancery cause."

5. In Failing to Hold that the Reservations in the State Court Order of September 10, 1951, Precluded Fidelity from Availing Itself of the Defense of the Statute of Limitations, the Decision of the Court of Appeals is Contrary to the Law of West Virginia.

Counsel for Fidelity approved and acquiesced in the entry of the order entered by the State Court in the notice of motion judgment proceeding on September 10, 1951 (R. 47). By said order a copy of the permanent injunction order of January 9, 1951, was filed, and Fidelity was dismissed as a party to the State Court action, but without prejudice to the right of the Bank to institute and prosecute in any court of competent jurisdiction any action against Fidelity which does not arise contractually under the insurance policy and which does not violate the temporary and permanent injunctions issued in the interpleader action (R. 47).

According to the majority opinion in the instant case, the Bank's cause of action against Fidelity for deceit became barred by the two year statute of limitations on a date prior to the date of entry of said State Court order.

By not eliminating from the computation of the two year statutory period, the time the interpleader action was pending in the Federal Court and the time the motion for judgment proceeding was pending in the State Court, and sustaining Fidelity's plea of the statute of limitations, the majority opinion results in rendering of no effect the reservations in the final State Court order. Fidelity did not question the reservations at the time of entry of the order and took no appeal from the order.

In *Lutz* v. *Williams* (1919), 84 W. Va. 216, 99 S.E. 440, the court held that where an order or decree contains a saving clause "the saving clause limits and defines the scope of that adjudication, for it is a part of the decree."

In *Bodkin* v. *Arnold* (1898), 45 W. Va. 90, 30 S.E. 154,

the following statement appears in Syl. 1 of the W. Va. Rep:

> "When a decree is entered reserving the right to any party to further litigate any matter in controversy in the suit, such reservation may be reviewed on appeal by any party prejudiced thereby, and if no appeal is taken, such reservation becomes res adjudicata, and cannot be called in question by any party in any other suit or proceeding. (p. 97.)"

The reservations in the State Court order have become res adjudicata and cannot be called in question in any Court. Fidelity is bound by the reservations in the State Court order and it should not be permitted to disregard such reservations by pleading the statute of limitations as a defense to the Bank's claim.

The Court below did not consider or pass upon the res adjudicata effect of the State Court order. The Bank strongly believes that this question should have been considered and passed upon by the Court of Appeals; that had this question been considered the majority would have reached a different result; that the failure to consider this question results in a holding contrary to well-established law in West Virginia.

6. In Failing to Hold that the Doctrine of Estoppel Precluded Fidelity from Claiming that the Statute of Limitations Ran During the Period the Interpleader Suit was Pending, the Decision of the Court of Appeals is Contrary to Law.

The majority opinion passes upon the question of the statute of limitations as though the interpleader suit had never been instituted. In so doing, the Bank's situation during the pendency of the interpleader suit is entirely overlooked. The Bank instituted a timely contractual action against Fi-

delity in the State Court. In view of the facts then known to the Bank, such action against Fidelity on the basis of the assignment was the proper procedure for the Bank to take. The Bank unquestionably could have prevailed against Fidelity in such action had it been permitted to continue. The filing of the interpleader action by Fidelity in the Federal Court and the temporary and permanent injunctions issued therein completely destroyed all legal rights of the Bank to proceed contractually against Fidelity. Furthermore, the filing of the interpleader suit precluded the Bank from raising defenses, based on policy provisions, to the adverse claim of the insured's wife.

The filing of the interpleader suit by Fidelity made it necessary for the Bank to engage in protracted, expensive and unsuccessful litigation with the insured's wife over their respective rights to the insurance money. The Bank litigated its claim vigorously and in good faith, but lost out to the wife. Furthermore, the pendency of the interpleader action created a situation such that until the uncertainties of the litigated questions had been cleared up by the final decree in the inter pleader suit, the Bank was not in a position to prove deceit and damage against Fidelity. The nature and extent of the Bank's claim was necessarily dependent upon the final decision in the interpleader action.

Under such circumstances it would be inequitable to hold that the statute of limitations ran during the time the interpleader suit was pending. This view is supported by *Macke* v. *Jungels* (1918), 102 Neb. 123, 166 N.W. 191, in which case the maker of notes given in settlement of a slander claim thereafter brought suit in equity to cancel the notes on account of undue influence in the procurement. The court held the notes void, but further held that the payee of the notes could then prosecute the slander claim and that the statute of limita-

tions did not run during the time the equity suit was pending In the opinion, the court said:

> "It would be inequitable that defendant's claim for damages should be lost by the running of the statute of limitations during the time this action has been pending. The nature and extent of her claim have depended upon the results of this litigation. During its pendency she has not been free to otherwise prosecute it. While in this action she has defended upon the ground that undue influence was not exerted, she appears to have prosecuted her defense in good faith."

In the absence of a case in point in West Virginia, it is urged that the rule laid down by the Nebraska court be followed in this case as rule of general law in West Virginia.

Moreover, Fidelity at all times maintained that under the policy provisions the Bank's assignment was paramount to the prior but unrecorded assignment of insured's wife. In the letter of June 3, 1949, by Fidelity to counsel for insured's wife, a copy of which letter was sent to the Bank, it is stated, "In our opinion, the wife is not entitled to the proceeds of the policy, since a completed copy of the assignment was never filed with this Company. The policy in question specifically provides that no assignment shall be binding upon the Company unless the original or duplicate is filed at the Head Office." (R. 86). Fidelity thereby led the Bank into a false sense of security.

Under all of the circumstances of this case, it manifestly would be inequitable to permit Fidelity to plead the statute of limitations because of its own course of conduct. This view is supported by the principles laid down in *Scarborough* v. *Atlantic Coast Line Raidroad Company* (1949), 4 Cir., 178 F. 2d. 253, wherein, on page 258, Judge Dobie said:

"*** And just such a principle was set out by Vice Chancellor Leaming, in *Howard* v. *West Jersey & Southern Railroad Co.*, 102 N. J. Eq. 517, 141 A. 755:

" 'One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.' "

"Vice Chancellor Leaming thus applies to statutes of limitations the ancient and beneficient doctrine of estoppel."

It is therefore respectfully submitted that the decision of the Court of Appeals is contrary to well-established general law which should have been adopted as the law of West Virginia applicable to this case.

CONCLUSION

For the reasons and upon the authorities hereinabove set forth, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

JOHN D. AMOS
Deveny Building
Fairmont, West Virginia

WILLIAM P. LEHMAN
Home Savings Building
Fairmont, West Virginia

Counsel for Petitioner

19

Office - Supreme Court,
FILED
JAN 11 195
HAROLD B. WILLEY,

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

In The Supreme Court Of The United States

OCTOBER TERM, 1953

No. 484

CITY NATIONAL BANK OF FAIRMONT,
A NATIONAL BANKING CORPORATION,
Petitioner

Vs.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, A CORPORATION,
Respondent

RUSSELL L. FURBEE
C. H. HARDESTY, JR.
People's Building
Fairmont, West Virginia
Counsel For Respondent

INDEX

	Page
Opinions Below	2
Statement of Case	2
Points, Authorities and Argument	4
1. Bank has not stated or proven a valid claim or cause of action for fraud, deceit or misrepresentation against Fidelity	4
2. The preliminary injunction granted in Interpleader action did not toll running of statute of limitations	6
3. The cause of action was barred by statute of limitations prior to institution of action by Bank	9
4. Statute of limitations was not tolled during pendency of Notice of Motion for Judgment proceeding in State Court	12
5. Reservations in State Court Order of September 10, 1951, have no effect on right of Fidelity to rely on defense of statute of limitations	13
6. Institution of Interpleader action by Fidelity did not toll the statute of limitations	16
Conclusion	17

TABLE OF CASES CITED

Acker v. Martin, 68 S.E. 2d 721 (W. Va. 1952)	5
Baker v. Hendrix, 126 W. Va. 37, 27 S.E. 2d 275	10
Bodkin v. Arnold, 45 W. Va. 90, 30 S.E. 154	15
Boyd v. Beebe, 64 W. Va. 216, 61 S.E. 304	9

Page

Cameron v. Cameron, 111 W. Va. 375, 162 S.E. 173 10

Harper v. Harper, 252 F. 39 (4th Cir.) 10

Horton v. Tyree, 102 W. Va. 475, 135 S.E. 597 6

Hunt v. Hunt, 91 W. Va. 685, 114 S.E. 283 5

Lutz v. Williams, 84 W. Va. 216, 99 S.E. 440 16

Mathews v. Dale, 118 W. Va. 303, 190 S.E. 338 10

Merchants National Bank v. Spates, 41 W. Va. 27, 23 S.E. 681 10

Pick Mfg. Co. v. General Motors Corp. (1936) 299 U.S. 3, 57 S. Ct. 1, 81 L. Ed. 4 17

Pickett v. Aglinsky, 110 Fed. Rep. 2d 628 9

Ripley v. United States, 223 U.S. 695 5

Scott v. Rinehart & Dennis Co., 116 W. Va. 319, 180 S.E. 276 9

Town of Clendennin v. Ledsome, 129 W. Va. 388, 40 S.E. 849 12

U. S. v. Wunderlich, 72 S.C.R. 154 5

WEST VIRGINIA STATUTES CITED

Michie's 1949 Annotated Code of West Virginia, Chapter 55, Article 2, Section 18 (Serial Section 5410) and Chapter 55, Article 2, Section 7 (Serial Section 5399) 10, 12

In The
Supreme Court Of The United States

OCTOBER TERM, 1953

No. 484

CITY NATIONAL BANK OF FAIRMONT,
A NATIONAL BANKING CORPORATION,
Petitioner

Vs.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, A CORPORATION,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

The respondent, The Fidelity Mutual Life Insurance Company, respectfully prays that a petition for a writ of certiorari by petitioner, City National Bank of Fairmont, to the United States Court of Appeals for the Fourth Circuit to review a final judgment entered August 8, 1953, be denied.

OPINIONS BELOW

The opinion of District Judge Warlick is reported in 110 F. Supp. 510 and the opinion of the Court of Appeals is reported in 206 F. 2d 531 as stated in the petition.

STATEMENT OF CASE

The facts as set forth in petitioner's "Statement of Case" are correct in part and the respondent herein desires to set forth only such additional facts as will provide a complete and correct statement of the case.

The petitioner, City National Bank of Fairmont (hereinafter called Bank), states that its charge of fraud and deceit against respondent, The Fidelity Mutual Life Insurance Company (hereinafter called Fidelity), is based upon the failure of Fidelity's general agent to disclose information concerning the existence of an adverse claim against the insurance policy in question, and upon which policy, as collateral, the Bank made a loan. It should be made clear that Hupp, as general agent, stated to the Bank, "I have received a telegram which says 'There are no assignments here on record' ". Hupp did not state that the policy was clear of assignments. At the time the statement was made by Hupp, no assignment of the policy had been filed with Fidelity. There had been correspondence with attorneys for insured's wife concerning an agreement by insured to assign policy to insured's wife, but no formal assignment had been filed with Fidelity prior to Bank's loan, although repeated requests for information concerning the formal assignment itself had been made by Fidelity. The statement made by Hupp, as general agent, was therefore a verity. The policy of insurance, which at the time the loan was made, was in the Bank's possession, provided

that no assignment was binding on Fidelity until filed in Fidelity's office, and further that Fidelity assumes no obligation as to the effect, sufficiency, or validity of any assignment (R. 15). The Bank is charged with knowledge of these provisions and the statement of the general agent that "There are no assignments here on record", would have to be considered in connection with this policy provision. Even though Hupp had received copies of correspondence between Fidelity and attorneys for insured's wife wherein it was stated that certain conditions relating to assignments must be complied with before there could be an assignment, Hupp, prior to the time the money was advanced by the Bank, was advised by insured, who had the policy in his possession and later surrendered the policy to Bank, that nothing had come of the negotiations with his wife. Any knowledge Hupp may have had concerning an attempt by insured to make a previous assignment of policy was in this matter answered by insured and his doubts in regard thereto disabused. It cannot therefore be said that Hupp was aware of a previous attempt to assign the policy by insured.

The Bank contends, in its Statement of Case, that it first learned that Hupp had knowledge of attempts of insured to assign policy to wife prior to assignment to Bank at the trial of the interpleader action on April 6, 1950. Any Statement of Case is incomplete as regards knowledge by the Bank of the claim of insured's wife unless it sets forth the following:

1. Bank received a letter from Fidelity, dated May 9, 1949, advising them of claim of insured's wife.

2. Bank received a copy of letter, dated May 26, 1949, sent to Philadelphia National Bank by Fidelity, advising it that draft drawn on Fidelity could not be honored because of claim of insured's wife.

3. Bank received a copy of letter, dated June 3, 1949, addressed to attorney for insured's wife, wherein the claim of Bank and claim of insured's wife was discussed at length.

4. Bank was fully informed of all facts regarding the conflicting claims of Bank and insured's wife when Fidelity instituted its interpleader action on June 29, 1949.

5. Bank was further informed of all the correspondence between Fidelity and insured's wife relating to attempted assignment to her when the answer of insured's wife in the interpleader action was filed August 23, 1949.

From the above it is clear that Bank cannot now state as a fact that it first learned Fidelity and Hupp had knowledge of previous attempt to assign by insured on April 6, 1950.

These additional facts were for the most part taken from the opinions of the Court of Appeals and District Judge Warlick and are considered important to a complete statement of the case.

POINTS, AUTHORITIES AND ARGUMENT

I. Bank Has Not Stated or Proven A Valid Claim or Cause of Action For Fraud, Deceit or Misrepresentation Against Fidelity.

The Bank in stating that the Court of Appeals erred in expressing no opinion as to the validity of the Bank's claim for fraud and deceit, overlooks entirely the opinion of District Judge Warlick, which was not disturbed or overruled by the Court of Appeals. Judge Warlick in his opinion (R. 22) stated:

"Presented with the situation that Lallemant (in-

sured) went to the office of Hupp, the general agent of the defendant (Fidelity), for the purpose of effecting a loan on the policy of insurance owned by him, and was acquainted with Hupp, with whom he had on a former occasion discussed the property value of his policy, and that in consequence thereof Hupp contacted some one of the officials of the plaintiff (Bank) and thereafter on the evidence heard the loan was effected, I fail to see the Fraud, Misrepresentation and Deceit which in my opinion must be shown for a recovery herein, and for that reason I must and I do conclude that the plaintiff (Bank) is not entitled to recover therefor."

Judge Warlick in reaching the above opinion relied on the following principles of law (R. 21).

"Fraud is never presumed and must be established by one who alleges it by clear and distinct proof."

Acker v. *Martin*
68 S.E. 2d 721 (W. Va. 1952)

Hunt v. *Hunt*
91 W. Va. 685 (114 S.E. 283)

"Gross Mistake implying bad faith is equated to 'fraud'. * * * By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest."

Ripley v. *United States*
223 U. S. 695

U. S. v. *Wunderlich*
72 S.C.R. 154

"The courts almost uniformly hold that an action for false representation, called also an action of or for deceit, may be maintained against a party who makes

a false representation of a fact *with knowledge of its falsity,* with intent that it be acted upon, where the person to whom it is made acts upon it, and by so doing suffers injury." (Italics supplied)

Horton v. *Tyree*
102 W. Va. 475 (135 S.E. 597)

From the above it is clearly seen that the petitioner has mis-stated the facts as they exist when it, in its Brief, states that it is an established fact that the Bank lost $5,000.00 through deceit and false representation. (P. B. 10). The District Judge in plain and unequivocable language ruled that a case for damages on fraud and deceit had not been proven. There is no evidence of conscious wrongdoing or an intent to cheat or be dishonest disclosed in the Record or Brief of the petitioner.

2. The Preliminary Injunction Granted in The Interpleader Action Did Not Toll The Running of The Statute of Limitations.

The petitioner urges in its Brief that the preliminary injunction granted in the interpleader action brought by Fidelity had the effect of tolling the statute of limitations. Both the Court of Appeals and the District Court rendered very definite opinions disposing of this contention.

District Judge Warlick in his opinion (R.19) after setting forth the prayer for relief by Fidelity and the injunctive order issued by the District Court pursuant thereto stated:

"It is evident from a study that the plaintiff (Bank) was not precluded by said restraint from instituting this action or any comparable action against the defendant

(Fidelity) to recover on the facts alleged herein, and that to have done so without authority would not have constituted a contempt of Judge Baker's order, and that upon motion made and had before him that such relief would have been granted; so that plaintiff may have been privileged to institute this action or any comparable action at any time during the pendency of the Interpleader Cause."

The Court of Appeals after stating that it agreed with the District Judge goes on further to state (R. 118):

"Judge Baker, though, was interested only in protecting Fidelity against suits connected with the fund deposited in Court by Fidelity, representing the cash surrender value of the policy. Actions against Fidelity for tortious misrepresentations as to policy were beyond his ken and without his concern. He did not intend to prevent such actions. Indeed, we go further by stating he had no power to issue so broad an injunction. The injunction granted by Judge Watkins was so carefully worded as to make it crystal clear that this injunction did not bar the instant action."

In light of the above, it is difficult to find meritorious argument in support of Bank's contention that the injunctive order tolled the statute of limitations. While Counsel for Bank may have been uncertain as to the meaning of the injunctive order, they had the right at all times to appear before the District Judge for a determination of right of Bank to bring its action against Fidelity for fraud or deceit. It was their duty so to do and the opinions cited above make it clear that the Bank's right to bring this action was not enjoined. Fidelity cannot be held responsible for their derelictions.

The Bank in its Brief (P. B. 14) also urges that as Counsel for Fidelity approved an order whereby the proceedings in State Court were dismissed as against Fidelity, Counsel for Fidelity considered that the injunctive order precluded an action for fraud and deceit. It is stated that it is inconceivable that Counsel for Fidelity would have consented to entry of this order unless they recognized that the preliminary injunction order was broad enough to cover an action of fraud and deceit. Such reasoning has neither law or logic to support it. The notice of motion for judgment in the State Court against insured and Fidelity was the very basic cause and reason why Fidelity found it necessary to bring its interpleader action. The preliminary injunction was issued by Judge Baker and later made permanent by order of Judge Watkins pursuant to a prayer for injunctive relief by Fidelity, which injunction and prayer are set forth in District Judge Warlick's opinion (R. 13). The Bank was enjoined and restrained from further prosecuting the action brought by it in State Court. It was therefore mandatory that Counsel for Bank prepare an order dismissing the action against Fidelity in State Court and failure to do so would have made Bank guilty of contempt of Court. Counsel for Bank, not Counsel for Fidelity, prepared the order of dismissal of the State Court proceedings which was entered on September 10, 1951 (R. 47). The only issue in the State Court proceedings was Fidelity's liability on an insurance policy given by insured as collateral for insured's note. It would be beyond the jurisdiction of the State Court if an entry of an order therein in a contract action on a note had the effect of deciding the merits of a case or issues between the parties based on tortious action not then instituted. It is more logical to argue that since Counsel for Bank prepared the order and provided therein that the dismissal was without prejudice to right of the Bank to institute any action against Fidelity which does

not arise contractually and which does not violate the injunctive order, that Counsel then knew that the injunction did not enjoin Bank's right to bring action for fraud and deceit against Fidelity, or they would not have so provided. In other words, why would Counsel provide in an order for a right which they now urge was enjoined at the time they prepared the order. Certainly Counsel for Fidelity could not agree to an order which would have the effect of deciding an issue not then before the court. The question of whether the statute of limitations had run could only be decided when the Bank brought its action for fraud and deceit and all the facts concerning the alleged fraud and deceit were before the Court. The issues raised by petitioner in urging that the statute of limitations was tolled by the injunctive order issued in the interpleader action were clearly and completely answered by the District Judge and the Court of Appeals and their reasoning set forth above is too convincing to require further citations.

3. The Cause of Action Was Barred by The Statute of Limitations Prior to Institution of Action by Bank.

The question as to when the statute of limitations starts to run on actions of fraud and deceit in West Virginia has been decided by the Court of Appeals for the Fourth Circuit. In *Pickett* v. *Aglinsky*, 110 Fed. Rep. 2d 628, at page 629, Judge Parker, speaking for the Court, stated:

> "The decisions of West Virginia must be followed in the interpretation of the statute; and there can be no question but that, under those decisions, the period of limitation runs from the time when the wrong is committed and the cause of action accrues, and not plaintiff's discovery of it. *Scott* v. *Rinehart & Dennis Co.*, 116 W. Va. 319, 180 S.E. 276; *Boyd* v. *Beebe*,

64 W. Va. 216, 61 S.E. 304, 17 L.R.A., N.S. 660; *Merchants National Bank* v. *Spates*, 41 W. Va. 27, 23 S.E. 681, 56 Am. St. Rep. 828; *Harper* v. *Harper*, 252 F. 39 (4th Cir.)."

The above rule of law more recently has been cited with approval by the West Virginia Supreme Court of Appeals in *Baker* v. *Hendrix* (1943), 126 W. Va. 37, 27 S.E. 2d 275.

The District Judge and the Court of Appeals in their opinions in the instant case adopted and thereby re-affirmed the rule that the period of limitations begins to run when the alleged wrong is committed, and not from the injured party's discovery of it.

The cases cited by Bank in support of its contention that statute does not begin to run until the fraud is discovered all involved factual situations materially different from the instant case. In *Cameron* v. *Cameron* (1931), 111 W. Va. 375, 162 S.E. 173, there were subsequent acts on the part of the wrongdoer, each constituting a new cause of action. In *Mathews* v. *Dale* (1937), 118 W. Va. 303, 190 S.E. 338, again the wrongdoer was guilty of subsequent acts which renewed the original wrongful act. The facts of subject case are clear that the petitioner complains of only one wrongful act and there were no subsequent acts to continue or renew the original alleged fraud or deceit.

The most liberal decisions in all jurisdictions state that the statute of limitations begins to run when the fraud or mistake is discovered, or by the exercise of due diligence, ought to have been discovered. West Virginia has a statute, Chapter 55, Article 2, Section 7, (West Virginia Code, 5399) which while it applies only to "Actions on Bonds of Personal Representatives and Fiduciaries Generally" follows the above rule. Giving the petitioner the benefit of the

application of this liberal rule does not change the result of the instant case. In the opinion of the Court of Appeals it was stated (R. 116):

> "But, even if this statute be applicable, it does not help the Bank. For we think that, more than two years before the instant action was instituted, the Bank, 'by the exercise of due diligence,' ought to have discovered the alleged 'fraud or mistake.'
>
> "Fidelity's letter to the Bank, May 9, 1949, advising the Bank of Mrs. Lallemant's adverse claim and of Fidelity's unwillingness to pay the Bank, certainly put the Bank on notice and should have prompted inquiry by the Bank. The Bank was fully informed upon the institution, June 29, 1949, of the Interpleader action by Fidelity. And, to clinch this matter, the answer of Mrs. Lallemant in the Interpleader action, filed August 23, 1949, fully informed the Bank of the details of her claim.
>
> "Yet, in the face of all this, the Bank did nothing. We quote from the very naive testimony of Carl Springer, cashier of the Bank:
>
> 'Q. So that you acting as the head of the bank did nothing whatsoever from the time you first received the May 9th, 1949, letter from the Company up until this Court met here in April, 1950, to find out what Mrs. Lallemant's claim was all about, that is correct?
>
> 'A. We were not interested in finding out what it was about because we thought our assignment was good, see.
>
> 'Q. My question is you made no effort whatsoever to find out what her claim was about, isn't that correct? (fol. 120) A. I did not.'
>
> "But we are solemnly told in the Bank's brief:

'It was not until the hearing in the interpleader action on April 6, 1950, that appellant first learned that Hupp knew of Mrs. Lallemant's adverse claim, but failed to disclose this to the appellant on March 4, 1949.'

"If this be true, the Bank's failure to learn sooner that Hupp knew of Mrs. Lallemant's adverse claim was due to the Bank's clear negligence and unjustifiable inaction."

Similar language was also used in the opinion of District Judge Warlick (R. 17). It therefore appears clear that regardless of the rule of law followed by this Court in determining when the statute of limitations begins to run, the action of Bank was barred by the statute prior to its institution on September 21, 1951.

4. Statute of Limitations Was Not Tolled During Pendency of The Notice of Motion For Judgment Proceeding in The State Court.

The petitioner in its Brief urges that Chapter 55, Article 2, Section 18 (Serial Section 5410) of Michie's 1949 Annotated Code of West Virginia applies and that the Court of Appeals and District Court erred in not applying the statute to the facts of this case. A careful review of the statute and a reading of the cases decided thereunder makes it clear why the lower courts did not consider the Bank's contention of sufficient merit to discuss.

In *Town of Clendenin* v. *Ledsome,* 129 W. Va. 388, 40 S.E. 2d 849, the West Virginia Supreme Court of Appeals held:

"We are of the opinion that on the law side, in order to apply the provision of Code 55-2-18, it is

necessary that the cause of action and the parties be the same."

Certainly it cannot be contended by Bank that a contract action of notice of motion for judgment upon a note and a tortious action for fraud and deceit constitute the same cause of action. Such a distinction is elementary. District Judge Warlick, in disposing of this contention stated (R. 19):

"Plaintiff (Bank), in its brief, admits that the subject matter of this action is not the same as the subject matter embraced in the Interpleader action, this sounding in tort, and the other sounding in contract."

Therefore, the Bank having properly admitted in its Brief submitted to the District Court that the cause of action in the interpleader action was not the same as its action sounding in tort for fraud and deceit cannot now contend that a contract action on a note is the same cause of action as an action in tort for fraud and deceit and now attempt to apply this statute.

5. Reservations in State Court Order of September 10, 1951, Have no Effect on The Right of Fidelity to Rely on Defense of Statute of Limitations.

In point (2) above the illogical argument of the Bank that the agreement of Counsel for Fidelity to enter an order in State Court dismissing the proceeding as to Fidelity was an indication by said Counsel that they considered the injunction of the District Court as a bar to the action of Bank for fraud and deceit was discussed. The Bank also contends in its Brief that the agreement of Counsel for Fidelity to the entry of the order dismissing the action of

Bank in its notice of motion for judgment action in State Court against insured and Fidelity on note of insured prevents Fidelity from later asserting a defense of the statute of limitations, because the order provided (R. 47) that the dismissal was without prejudice to institute and prosecute any action which does not arise contractually out of the policy of insurance and which does not violate the injunction awarded by said Federal Court in its orders of the 29th day of June, 1949, and the 9th day of January, 1951.

The argument that entry of this order prevents Fidelity from later asserting a defense of the statute of limitations is without merit for two reasons:

First: The entry of an order of dismissal couched in the language used was made mandatory by the District Court orders of June 29, 1949, and January 9, 1951.

Second: Cases cited by petitioner are not authority for the argument advanced.

The District Court order of January 9, 1951 (R. 46), entered in the interpleader action making the preliminary injunction final contained the following language:

> " * * * it is therefore, adjudged, ordered and decreed that said injunction so heretofore awarded in this action be and the same is hereby made perpetual insofar and to the extent only that said injunction applies to prosecuting any action against the plaintiff (Fidelity) arising contractually under said insurance policy No. 657697 * * *."

As a result of this order, it was mandatory that the Bank prepare and have entered an order in the State Court which dismissed Fidelity from the notice of motion for judgment action, or any action arising contractually under said in-

surance policy. The order entered by Bank in the State Court contained language identical to that in the final injunctive order of the District Court and to have worded it otherwise would have been a violation or a contempt of the District Court order. Certainly Counsel for Fidelity could not refuse to agree to the entry of an order in State Court which was directed to be entered by order of the District Court order. To have refused to agree to entry of this order would have placed Fidelity in contempt of a District Court order entered pursuant to the interpleader action brought by Fidelity seeking such relief.

It would therefore seem clear that Fidelity is not barred from asserting the statute of limitations as a defense because it agreed to entry of an order required by law.

The petitioner has cited two West Virginia decisions in support of its argument that entry of State Court order bars Fidelity from asserting its defense of the statute of limitations. In *Bodkin* v. *Arnold* (1898), 45 W. Va. 90, 30 S.E. 154, the West Virginia Supreme Court of Appeals was faced solely with the legal principle of ***res adjudicata*** and not whether the entry of an order in an entirely distinct cause of action can have any effect on another and different cause of action. The very language of the Court, as quoted by petitioner (P. B. 23), makes it clear that it has no application to the facts of this case. The Court in the *Bodkin* case, supra, stated in Syl. 1:

> "When a decree is entered reserving the right to any party to further litigate *any matter in controversy in the suit* * * * such reservation becomes res adjudicata." (Italics supplied)

The condition precedent, so to speak, to application of rule *is that it must be a matter in controversy in the suit in*

which the order is entered. The Bank has not and cannot contend that in the notice of motion for judgment proceedings on the insured's note that fraud and deceit of Fidelity or the barring of the action of fraud and deceit of Bank against Fidelity by statute of limitations was in issue. In *Lutz* v. *Williams* (1919), 84 W. Va. 216, 99 S.E. 440, cited by petitioner, the only issue raised was one of *res adjudicata* as to issues raised in the first suit on a subsequent suit on the same cause of action raising identical issues.

The Bank cannot rely on these decisions for the issues raised in its action for fraud and deceit were never raised, nor could they be raised, in an action of notice of motion for judgment on a note. It seems clear that no order in the State Court proceedings for collection of the note can have any effect on Fidelity's defense to action against it for fraud and deceit.

6. Institution of Interpleader Action by Fidelity Did Not Toll The Statute of Limitation.

Petitioner in its Brief would assert that the interpleader action instituted by Fidelity tolled the statute of limitations. This contention is merely another and repetitious way of stating that the issuance of preliminary and final injunctive relief by the District Court in the interpleader action tolled the statute of limitations. This contention has been answered by the Court of Appeals and the District Judge as is shown by respondent in point (2) above and in the interest of brevity and conciseness is not answered here except by reference.

The Bank in its Brief before the District Judge as is disclosed in the District Judge's opinion (R. 19), admitted that the cause of action in the interpleader action and in its

action for fraud and deceit were not the same. Such an admission states an actual fact and prevents the Bank from now urging that the interpleader action prevented it from bringing its action of fraud and deceit against Fidelity within the period allowed by the statute of limitations. Nor can the Bank contend that the statute of limitations does not begin to run until it suffered its damage. In point (1) above it was established that the statute begins to run from the date of the alleged injury and with this rule of law the Court of Appeals (R. 116) and District Judge (R. 17) agreed.

The Court of Appeals found that Fidelity had not led the Bank into a false sense of security, but that it had suffered its loss because of its own (Bank's) "clear negligence and unjustifiable inaction". The opinion of the Court of Appeals setting forth facts substantiating its charge of "clear negligence and unjustifiable inaction" is set forth in the record (R. 117) and in argument of respondent in point (3) above.

CONCLUSION

Inasmuch as the Supreme Court of the United States has held in *Pick Mfg. Co.* v. *General Motors Corporation* (1936), 299 U.S. 3, 57 S. Ct. 1, 81 L. Ed. 4., that it is an established rule that the Supreme Court accepts the findings in which the District Court and Court of Appeals concur, unless clear error is shown, it is respectfully submitted that the decisions of the Court of Appeals and District Court in which they find for the defendant, the Fidelity Mutual Life Insurance Company, should be affirmed, and the writ of certiorari should be denied.

Respectfully submitted,

RUSSELL L. FURBEE
C. H. HARDESTY, JR.
Peoples Building
Fairmont, West Virginia
Counsel for Respondent